

UTAH WILDERNESS ASSOCIATION

IBLA 84-863

Decided March 19, 1986

Appeal from a decision of the Bureau of Land Management District Manager, Vernal, Utah, denying a protest challenging issuance of permits to drill various oil and gas wells in a wilderness study area. 12-18-14-22, etc.

Dismissed as moot.

1. Administrative Procedure: Standing--Federal Land Policy and Management Act of 1976: Wilderness--Rules of Practice: Appeals: Standing to Appeal.

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

APPEARANCES: Wayne McCormack, Esq., and Jeffrey O. Burkhardt, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Utah Wilderness Association has appealed from a decision of the Bureau of Land Management (BLM) District Manager, Vernal, Utah, dated April 18, 1984, denying its protest of the issuance to Coseka Resources (U.S.A.) Limited (Coseka) of nine permits to drill various oil and gas wells.

The wells are located on certain Federal oil and gas leases within the Winter Ridge wilderness study area (WSA) (UT-080-730). 1/

The Winter Ridge inventory unit was originally eliminated from further consideration as a WSA by a decision of the Utah State Office, BLM, dated November 3, 1980, pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1982). 45 FR 75602 (Nov. 14, 1980). Appellant and others filed a timely protest challenging the elimination of the Winter Ridge unit (45 FR 86556 (Dec. 31, 1980)) and, by decision dated February 26, 1981, the State Office denied that protest (46 FR 15332 (Mar. 5, 1981)), which decision was appealed to the Board. On April 18, 1983, in Utah Wilderness Association, 72 IBLA 125, 190 (1983), the Board set aside the State Office's decision as to the Winter Ridge unit and remanded the case to BLM for a reassessment of the unit's WSA qualifications. By decision dated October 4, 1983, the State Office designated 42,462 acres in the Winter Ridge unit as a WSA. 48 FR 46858 (Oct. 14, 1983).

Between January 31 and October 3, 1983, Coseka filed nine APD's for oil and gas wells on land designated as within the Winter Ridge WSA on October 4, 1983. In each case, BLM prepared an environmental assessment (EA) addressing the environmental impact of approving the APD, concluding, in the case of pre-FLPMA leases, BLM could regulate lease activities only to prevent unnecessary and undue degradation to the environment in order to avoid unreasonable interference with the lessee's valid existing rights. 2/ BLM held, in each

1/ The following is a list of the various wells, the leases involved and the dates the leases were issued, the dates the applications for permits to drill (APD's) were filed, and the dates the permits were approved:

	Date Lease	Date APD	Date APD	
<u>Well No.</u>	<u>Lease No.</u>	<u>Issued</u>	<u>Filed</u>	<u>Approved</u>
12-18-14-22	U-6841	10/1/68	1/31/83	5/20/83
16-19-14-22	U-6841	10/1/68	2/11/83	7/28/83
7-20-14-22	U-10199	12/1/69	2/11/83	7/28/83
1-10-14-22	U-38072	12/1/69	2/7/83	7/28/83
16-13-14-21	U-10198	12/1/69	8/8/83	10/5/83
14-19-14-22	U-6841	10/1/68	9/12/83	10/17/83
6-12-14-21	U-18424	4/1/72	10/3/83	11/23/83
8-21-14-22	U-10199	12/1/69	3/3/83	8/16/83
13-1-14-21	U-10825	2/29/70	4/27/83	8/18/83

Appellant also protested the approval of an APD for well No. 2-1-14-21. However, the record indicates that Coseka withdrew the APD and it was never approved.

2/ In separate documents entitled "Impact to Wilderness Values-Evaluation Under the Nonimpairment Standard," BLM concluded, with respect to each proposed well, that it would not satisfy the nonimpairment criteria set forth in the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) at 10-11 (44 FR 72013 (Dec. 12, 1979)). These criteria provide that proposed uses must be temporary and any temporary impacts must be capable of being reclaimed so that their effect will be substantially unnoticeable in the WSA as a whole at the time the Secretary would make his recommendation to the President. The decisions to issue the APD's, notwithstanding the threatened impairment of wilderness characteristics, was apparently predicated on a belief

case, that approving the APD with appropriate stipulations would not significantly affect the environment and, thus, an environmental impact statement (EIS) would not be required under section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1982). BLM subsequently approved the APD's between May 20 and November 23, 1983.

By an instrument dated December 30, 1983, appellant filed a notice of appeal from BLM's approval of the APD's involved herein. In his April 1984 decision, the District Manager treated the appeal as a protest, and denied it. Appellant has filed a timely appeal from that decision.

In its statement of reasons for appeal, appellant contends that BLM improperly treated its December 1983 notice of appeal as a protest since it was a party to the case and, hence, entitled to appeal from BLM's approval of the APD's, under criteria enunciated in California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). Appellant bases its contention on the fact its members use the land and it had participated in the WSA designation process with respect to the Winter Ridge unit. Appellant argues its "appeal" was timely because it was not notified the APD's had been approved until December 1983. Appellant contends it was entitled to notice of the approval of the APD's as a party to the case and pursuant to the public participation provisions of NEPA and section 102(a)(5) of FLPMA, 43 U.S.C. § 1701(a)(5) (1982). 3/ Appellant states that notice was required either at the time of

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fn. 2 (continued)

that such action was required to recognize the valid existing rights of the lessees of these pre-FLPMA leases. See section 701(h) of FLPMA, 43 U.S.C. § 1701 note (1982).

In Instruction Memorandum (IM) No. 82-59, dated Nov. 5, 1981, the Director, BLM, stated that: "As a result of the U.S. District Court decision in Rocky Mountain Oil and Gas Association v. Andrus [500 F. Supp. 1338 (D. Wyo. 1980)], the Department of the Interior conceded that pre-FLPMA leases are not subject to the nonimpairment standard. That change in policy was issued by means of Instruction Memorandum 81-325 (March 12, 1981) and a Federal Register notice on April 6, 1981 (46 FR 20607)." IM No. 82-59 at 1-2 (emphasis in original). After referring to the Solicitor's Opinion, The Bureau of Land Management Wilderness Review and Valid Existing Rights, 88 I.D. 909 (1981), the BLM Director advised his subordinates that "if compliance with the nonimpairment criteria would unreasonably interfere with development under the lease rights, you must approve the activity even though it would cause impairment." IM No. 82-59 at 2. The decision cited by the Director, BLM was subsequently reversed sub nom. Rocky Mountain Oil and Gas Association v. Watt, 696 F.2d 734 (10th Cir. 1982). Although the court of appeals held that the nonimpairment standard of section 603(c) of FLPMA "remains the norm" \* \* \* with respect to all mineral leases regardless of their date of issuance," the court expressly declined an invitation to overrule the Solicitor's analysis of the impact of section 701(h) of FLPMA protecting valid existing rights, leaving adjudication of valid existing rights in the context of a pre-FLPMA lease to subsequent litigation. 696 F.2d at 746 n.17 (emphasis in original). 3/ Appellant provides copies of various correspondence with the BLM State Office regarding notice of the processing of APD's in WSA's. By letter dated Jan. 5, 1983, appellant requested the State Office to indicate how notice

preparation of an EA, where a decision approving an APD is not stayed on appeal, or at the time of approval, where the decision is stayed. Appellant further argues that approval of the APD's does not satisfy the nonimpairment criteria set forth in the IMP and that the permits cannot be considered "grandfathered" uses. Appellant also contends that BLM should have considered other alternatives in the EA, and that an EIS should have been prepared, prior to approval of the APD's, especially where the nine permits involved are part of a proposal to engage in extensive drilling within the Winter Ridge unit with anticipated cumulative and significant environmental impacts. Appellant contends that, in any case, operations under Coseka's permits should be suspended pending a determination whether approval of the APD's was proper. <sup>4/</sup>

On June 25, 1984, the Regional Solicitor, on behalf of BLM, filed a motion to dismiss appellant's appeal on the basis it is moot. The Solicitor argues the appeal is moot because the drilling activity appellant seeks to prevent "has already occurred under lawfully issued permission pursuant to applications for permission to drill or will not occur." The Regional Solicitor notes that two of the wells have been completed, one well has been plugged and abandoned, drilling has been abandoned on another well, and there are no "foreseeable" plans to drill the remaining wells. Appellant opposes the motion to dismiss.

At the outset, we note BLM properly denied appellant's "protest" because it was untimely. The regulation at 43 CFR 4.450-2 provides that a protest is

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fn. 3 (continued)

would be provided to the public of pending APD's. BLM responded in a letter dated Feb. 9, 1983, that public notice of pending APD's and of the availability of BLM's environmental analyses would be placed in local newspapers and "interested parties" would be informed by mail. BLM also stated that a "review period" would be allowed, which would vary in length "depending on the complexity and anticipated public interest." BLM stated that, because of the 30-day time constraint placed on BLM by 30 CFR 221.23(f), 47 FR 47769 (Oct. 27, 1982) (redesignated as 43 CFR 3162.3-1(f) (1984)) in which to act on APD's, a decision to approve an APD would be "implemented without further delay." BLM concluded that "[u]nder these circumstances it is necessary for interested parties to track the progress and final actions on APD's."

<sup>4/</sup> On May 21, 1984, appellant specifically filed a motion to stay the effect of the BLM decisions approving the APD's involved, either under 43 CFR 4.21(a) or 43 CFR 3165.4. The regulation at 43 CFR 4.21(a) provides that a decision will be stayed during the time an adversely affected person may appeal and during the pendency of any appeal except where relevant regulations provide otherwise. However, 43 CFR 3165.4 provides that appeals from "[i]nstructions, orders or decisions issued under the regulations in [43 CFR Part 3160 (Onshore Oil and Gas Operations)] \* \* \* shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken," unless the Board invokes a suspension. In Animal Protection Institute of America, 79 IBLA 94, 102 n.3, 91 I.D. 115, 120 n.3 (1984), we held that BLM decisions "concerning" APD's are not stayed pending appeal, citing 43 CFR 3165.4. Thus, the decision to approve an APD is not subject to the automatic stay provision of 43 CFR 4.21(a).

an objection "to any action proposed to be taken." A protest filed after the action being opposed has been taken is untimely and properly denied by BLM for that reason. Sierra Club Legal Defense Fund, Inc., 84 IBLA 311 (1985).

[1] Nevertheless, there remains the question of whether the December 1983 notice of appeal should have been treated as a valid appeal under 43 CFR 4.410(a), which provides, in relevant part, that "[a]ny party to a case who is adversely affected by a decision of an officer of [BLM] \* \* \* shall have a right to appeal to the Board." Id. In order to be entitled to appeal, a purported appellant must be not only "adversely affected" by the BLM decision but must also be a "party to [the] case."

An appellant will generally be regarded as a "party to a case" where it has filed a protest to a proposed action and has appealed from a denial of that protest. In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). However, an appellant may also be regarded as a "party to a case," in the absence of a protest, where it has participated in the decisionmaking which led up to the action being appealed. See Sharon Long, 83 IBLA 304, 307-08 (1984). Thus, in Animal Protection Institute of America, 79 IBLA at 102 n.2, 91 I.D. at 120 n.2, we held that the appellants who were challenging a decision to allow drilling of oil and gas wells in a WSA on the basis of an EA were considered parties because they had "participated in the development of the EA and their views were known and responded to by BLM." Our holding was consistent with the purpose of the requirement that an appellant be a "party to a case" as set forth in California Association of Four Wheel Drive Clubs, supra at 385, which is "to afford a framework by which decisionmaking at the departmental and State Office level may be intelligently made." The Board further stated in California Association of Four Wheel Drive Clubs that requiring an appellant to be a "party to a case" is necessary to ensure BLM has the benefit of appellant's input in the initial decisionmaking process prior to review on appeal by the Board.

In this case, appellant contends it did not receive notice of the pending APD's until after they had been approved, thus precluding the timely filing of a protest. It appears from the record that notice of application to stake well sites for the various wells (giving the location of the proposed well sites) was published in local papers on November 18, 1982, and January 6, 1983. The applications to stake well sites were apparently superseded by the subsequently filed APD's. However, notice of the actual APD's was apparently not published in the newspaper before the APD's were granted.

However, there is evidence that appellant sought to participate in the decisionmaking process which led up to approval of the APD's. Thus, the EA (No. 110-83) prepared for the APD filed for well No. 12-18-14-22 recognized that: "The Sierra Club, the Western River Guide Association and the Utah Wilderness Association are on record as the interested environmental groups requesting the opportunity for review and comment upon this proposed action" 5/ (EA at 19). We note 43 CFR 3162.3-1(f) provides that "upon

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5/ The EA addressed not only the APD for well No. 12-18-14-22, but also assessed the impact of field development in a portion of the Winter Ridge

initiation of the Application for Permit to Drill process \* \* \* [BLM] will consult with \* \* \* appropriate interested parties." Under the circumstances, we find BLM was bound by its own regulations to notify appellant of the filing of the APD and allow a reasonable opportunity to comment. We decline to require personal notice of all contemplated actions affecting the land and natural resources of an area because a party has asserted a general interest in events affecting that area. However, the correspondence of record and the EA make it clear that appellant was recognized by BLM as having expressed a specific interest in APD's within this WSA and, hence, was entitled to notice of the filing of the APD's.

Appellant also argues it was entitled to notice of the EA's regarding the APD's under the NEPA regulations promulgated by the Council on Environmental Quality, specifically 40 CFR 1506.6. The regulation at 40 CFR 1506.6(a) requires agencies to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures." Moreover, 40 CFR 1506.6(b) requires agencies to "[p]rovide public notice of \* \* \* the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." Environmental documents include EA's. 40 CFR 1508.10. The required public notice in matters of local concern, as in this case, "may include" publication in local newspapers or agency newsletters. 40 CFR 1506.6(b)(3). An agency is required to mail notice "to those who have requested it on an individual action." 40 CFR 1506.6(b)(1). 6/

As noted previously, the purpose of limiting standing to appeal to a party to the case is to afford an intelligent framework for administrative decisionmaking, based on the assumption that BLM will have had the benefit of the input of such a party in reaching its decision. See California Association of Four Wheel Drive Clubs, supra. In a situation such as the present case where a party has actively participated in the consideration of an inventory unit for eligibility as a WSA, before both BLM and the Board; has requested in writing the opportunity to comment on APD's filed for lands within the unit; and has been recognized by BLM as a party wishing to have

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fn. 5 (continued)

unit (EA at 1). Thus, the assessments prepared in response to subsequent APD's are entitled "Supplementary Assessment to Environmental Assessment 100-83 for Field Development." 6/ The failure of BLM to publish the EA's for the APD's prior to approval thereof in this case is apparently explained in part in correspondence appearing in the file. In a letter to the Chief, Oil and Gas Operations, dated July 20, 1983, the Area Manager, Bookcliffs Resource Area, stated, with respect to the EA's for oil and gas wells 1-10-14-22, 7-20-14-22, 16-19-14-22, 8-21-14-22, and 13-1-14-21:

"In the five cases with pre-FLPMA leases involved we do not believe a comment period will be required and we believe that the valid pre-FLPMA lease rights allow for the approval of each of the five actions when adequate stipulations to prevent undue and unnecessary damage to the environment are included in the condition of approval."

Indeed, in the same letter, the Area Manager recommended a 30-day comment period "following publication of the assessment for [an] APD" in the case of a post-FLPMA lease.

input in the process of adjudicating APD's for lands in the unit, we must conclude this test of standing has been met. Id.

Notwithstanding the course taken by BLM, it would appear that where the exercise of discretion is involved in granting a permit, notice and a comment period are properly required in advance of the decision which is the subject of the EA regardless of whether the scope of a decision is limited by the valid existing rights of the lessee. This Board has in the past declined to require preparation of an EIS under NEPA with respect to the nondiscretionary issuance of patents to mining claims based on vested rights pursuant to the Mining Law of 1872, 30 U.S.C. § 22 (1982). See United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977); aff'd sub nom., South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980); United States v. Kosanke Sand Corporation (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973). However, those cases where discretion is lacking must be carefully distinguished from those cases where discretion is merely limited by the existence of valid existing rights. In Sierra Club (On Judicial Remand), 80 IBLA 251 (1984), the Board held that an EIS for an APD on a pre-FLPMA lease properly considers the no-action alternative. In that case the lease had been previously suspended by the Department upon the condition that the suspension would terminate if the APD were denied because operations would have an unacceptable impact on the wilderness characteristics of the area. A fortiori, the no action alternative with respect to issuance of an APD may be considered where suspension of the lease to protect the rights of the lessee is an option. Further, assuming recognition of valid existing rights under pre-FLPMA leases requires issuance of APD's, the EA is clearly useful in assessing any appropriate conditions to issuance of the APD's.

Conceding the standing of appellant to appeal issuance of the APD's in this case, 7/ we must consider the question of mootness raised by the Solicitor. To the extent that all activity authorized by the APD's had been carried out by the time the appeal was briefed before the Board, remand of the case to consider appellant's objections and to allow consideration of other alternatives would be an exercise in futility. Hence, we find it appropriate to dismiss the appeal in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed as moot.

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C. Randall Grant, Jr.  
Administrative Judge

We concur:

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Bruce R. Harris R. W. Mullen  
Administrative Judge

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Administrative Judge

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7/ Although the absence of service of notice on appellant of issuance of the APD's clouds the issue of the timeliness of the appeal therefrom, we conclude based upon the allegations of appellant (and we find no indication from the record to the contrary) that the notice of appeal was filed timely. See 43 CFR 4.411(a).

